

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SUSAN BURNAROOS, )  
Plaintiff, ) No. CV-12-03073-JTR  
v. ) ORDER GRANTING DEFENDANT'S  
CAROLYN W. COLVIN, Acting ) MOTION FOR SUMMARY JUDGMENT  
Commissioner of Social )  
Security,<sup>1</sup> )  
Defendant. )  
\_\_\_\_\_  
)

BEFORE THE COURT are cross-motions for Summary Judgment. ECF No. 16, 23. Attorney D. James Tree represents Susan Burnaroos (Plaintiff); Special Assistant United States Attorney Summer Stinson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 12. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

On August 29, 2008, Plaintiff filed a Title II application for a period of disability and disability insurance benefits, along with a Title XVI application for supplemental security income, both

<sup>1</sup>Carolyn W. Colvin, the current Acting Commissioner of Social Security, is hereby substituted as the Defendant herein. See FED. R. CIV. P. 25(d)(1).

1 alleging disability beginning January 4, 2004. Tr. 10; 146-51.  
2 Plaintiff reported that she could not work due to ADHD, OCD,  
3 depression, bipolar disorder, anxiety disorder, and PTSD. Tr. 179.  
4 Plaintiff's claim was denied initially and on reconsideration, and  
5 she requested a hearing before an administrative law judge (ALJ).  
6 Tr. 83-128. A hearing was held on October 12, 2010, at which  
7 medical expert Ronald Klein, Ph.D., vocational expert Diane K.  
8 Kramer, and Plaintiff, who was represented by counsel, testified.  
9 Tr. 33-82. ALJ Marie Palachuk presided. Tr. 33. At the hearing,  
10 Plaintiff amended her onset date to January 25, 2006. Tr. 40. The  
11 ALJ denied benefits on November 5, 2010. Tr. 10-22. The instant  
12 matter is before this court pursuant to 42 U.S.C. § 405(g).

13 **STATEMENT OF THE CASE**

14 The facts of the case are set forth in detail in the transcript  
15 of proceedings and are briefly summarized here. At the time of the  
16 hearing, Plaintiff was 29 years old, and she had completed the  
17 eighth grade. Tr. 67. Plaintiff's past jobs included briefly  
18 working at a women's shelter and organizing donated clothing, taking  
19 care of dogs and cats at the Humane Society and working as a cleaner  
20 and a maintenance worker at a hotel her mother managed. Tr. 56-57;  
21 68-69.

22 In her past, Plaintiff regularly used marijuana, cocaine, and  
23 methamphetamine. Tr. 298. Plaintiff's "drug of choice" was  
24 methamphetamine, and she "used it extensively." Tr. 298. Plaintiff  
25 testified that she has been sober since January 25, 2006. Tr. 54-  
26 55.

27 **ADMINISTRATIVE DECISION**

28 At step one, ALJ Palachuk found that Plaintiff had not engaged

1 in substantial gainful activity since June 30, 2004. Tr. 12. At  
 2 step two, she found Plaintiff had the severe impairments of "drug  
 3 induced mood disorder vs. depressive disorder, borderline  
 4 personality disorder with anti-social traits, and methamphetamine  
 5 abuse, in remission since January 2006 per claimant report . . . ."  
 6 Tr. 12-13. At step three, the ALJ determined that Plaintiff does  
 7 not have an impairment or combination of impairments that meets or  
 8 medically equal one of the listed impairments in 20 C.F.R., Subpart  
 9 P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,  
 10 416.920(d), 416.925 and 416.926). Tr. 13. The ALJ also found that  
 11 Plaintiff has the residual functional capacity ("RFC") to perform a  
 12 full range of work at all exertional levels but with the following  
 13 nonexertional limitations, "the claimant is limited to simple,  
 14 routine repetitive tasks involving no more than two-step commands.  
 15 She should be away from the general public and have superficial  
 16 contact with small groups of coworkers. She would need additional  
 17 time to learn new tasks." Tr. 14. At step four, the ALJ found that  
 18 Plaintiff could perform past relevant work as a fast food worker and  
 19 housekeeper. Tr. 21.

#### 20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 22 court set out the standard of review:

23 A district court's order upholding the Commissioner's  
 24 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 25 Commissioner may be reversed only if it is not supported  
 26 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 27 Substantial evidence is defined as being more than a mere  
 28 scintilla, but less than a preponderance. *Id.* at 1098.  
 Put another way, substantial evidence is such relevant  
 evidence as a reasonable mind might accept as adequate to  
 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 389, 401 (1971). If the evidence is susceptible to more

than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If substantial evidence exists to support the administrative findings, or if conflicting evidence exists that will support a finding of either disability or non-disability, the Commissioner's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### **SEQUENTIAL PROCESS**

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.

1 This burden is met once a claimant establishes that a physical or  
2 mental impairment prevents him from engaging in his previous  
3 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
4 claimant cannot do his past relevant work, the ALJ proceeds to step  
5 five, and the burden shifts to the Commissioner to show that (1) the  
6 claimant can make an adjustment to other work; and (2) specific jobs  
7 exist in the national economy which claimant can perform. *Batson v.*  
8 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
9 If a claimant cannot make an adjustment to other work in the  
10 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
11 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

## 12 ISSUES

13 The question presented is whether substantial evidence exists  
14 to support the ALJ's decision denying benefits and, if so, whether  
15 that decision is based on proper legal standards. Plaintiff  
16 contends that the ALJ erred by finding her testimony about the  
17 severity of her symptoms was not credible, by failing to address  
18 multiple treating and examining medical source opinions, and by  
19 rejecting ADHD as a severe impairment at step two. ECF No. 16 at 5-  
20 6.

## 21 DISCUSSION

### 22 A. Credibility

23 Plaintiff contends that the ALJ erred by finding she lacked  
24 credibility. ECF No. 16 at 10-14. Specifically, Plaintiff  
25 complains that the ALJ erred by relying upon her statement that she  
26 had been receiving mental health treatment in Yakima for five years,  
27 when the records revealed she had been receiving treatment in Yakima  
28 for two years. Tr. 15; ECF No. 16 at 10-11.

1       The ALJ gave several reasons for discounting Plaintiff's  
2 credibility. See Tr. 15-18. One of the reasons the ALJ provided  
3 was that Plaintiff claimed she had been treated at CWCMH in Yakima  
4 for five years, or since 2005, but the record revealed no records  
5 prior to July 2008. Tr. 15. As Plaintiff points out, the record  
6 reveals Plaintiff was assessed in May 2008, for a re-evaluation, and  
7 an update for any changes to Plaintiff's condition since her last  
8 assessment. Tr. 348; ECF No. 16 at 11. The record reveals  
9 Plaintiff's testimony regarding when she transferred her treatment  
10 from the Ellensburg office to the Yakima office was equivocal, and  
11 provided only after insistent questioning:

12       Q. ... When did you stop going to Ellensburg Central  
13                   Washington Comprehensive Mental Health?

14       A. Well, I transferred over here to go to treatment. I  
15                   moved over here to go to treatment.

16       Q. So approximately when - year -

17       A. When I started seeing Nina.

18       Q. Year wise? Did you - stopped going to Ellensburg  
19                   approximately when?

20       A. It would go with the date of when I saw Nina, started  
21                   seeing Nina.

22       Q. I'm sorry. I know you're extremely - are you  
23                   extremely nervous?

24       A. Yeah.

25       Q. Okay. You're having a hard time testifying. You're  
26                   crying. I'm sorry.

27       A. I'm sorry.

28       . . .

29       A. The year, I can't remember the year to pinpoint it.  
30                   I'm sorry.

31       Q. But could you -

32       A. Five years I think.

1 Q. You think it's been about five years. Around five  
2 years ago you stopped going to the Ellensburg Central  
Washington Comprehensive Mental Health. Correct?

3 A. Yes.

4 Tr. 52-53. In light of Plaintiff's equivocal answer and highly  
5 charged emotional state, the ALJ's characterization of Plaintiff's  
6 uncertainty as dishonesty was not reasonable. The ALJ's use of  
7 Plaintiff's incorrect guess about the date she transferred her  
8 treatment from Ellensburg to Yakima was not a valid reason to  
9 discount Plaintiff's credibility.

10 The Plaintiff also complains that the ALJ erred by finding the  
11 testimony of Plaintiff's mother, Karen Poe, established Plaintiff  
12 could perform daily activities that contradicted her claims of total  
13 disability. ECF No. 16 at 11-12. The ALJ stated she gave "full  
14 consideration" to Plaintiff's mother's third-party function report.

15 Tr. 20; 202-09. The ALJ concluded that the report confirmed  
16 Plaintiff is able to perform routine, simple activities of daily  
17 living. Tr. 20. The ALJ's assessment of Ms. Poe's report is  
18 supported by the record. For example, Ms. Poe reported that  
19 Plaintiff cares for her own young child, prepares meals, performs  
20 routine household chores, and grocery shops, but she has trouble  
21 getting along with other people and with concentrating. Tr. 202-07.

22 Where the court concludes that one or more of the ALJ's reasons  
23 supporting an adverse credibility finding are invalid, the court  
24 examines whether the ALJ's reliance on such reasons was harmless  
25 error. *Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1162 (9th Cir.  
26 2008); *Batson*, 359 F.3d at 1195-97 (applying harmless error standard  
27 where one of the ALJ's several reasons supporting an adverse  
28 credibility finding was held invalid). The Ninth Circuit explained,

1 "So long as there remains 'substantial evidence supporting the ALJ's  
2 conclusions on credibility' and the error 'does not negate the  
3 validity of the ALJ's ultimate credibility conclusion,' such [error]  
4 is deemed harmless." *Carmickle*, 533 F.3d at 1162 (quoting *Batson*,  
5 359 F.3d at 1197). Here, the finding regarding Plaintiff's  
6 inaccurate memory of when she transferred treatment from Ellensburg  
7 to Yakima was legally insufficient. However, substantial evidence  
8 remains, supported by clear and convincing reasons, for the adverse  
9 credibility determination and therefore the error was harmless.

## B. Medical Opinions

11 Plaintiff argues that the ALJ erred by failing to address the  
12 opinions from Drs. Birdelbough, Nordyke, Martini and Toews, and by  
13 failing to include the limitations assessed by these doctors in the  
14 hypothetical and in Plaintiff's RFC. ECF No. 16 at 7-10. The ALJ  
15 is not required to discuss all evidence presented to him. See  
16 *Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984) (citing  
17 *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981)). Rather, the  
18 ALJ need only explain why "significant probative evidence has been  
19 rejected." *Vincent*, 739 F.2d at 1394-95.

1. Jay M. Toews, Ed.D. and Shahm Martini, M.D.

21 Jay M. Towes, Ed.D., examined Plaintiff on March 2, 2002, well  
22 in advance of Plaintiff's onset date, and before Plaintiff stopped  
23 using methamphetamine in January 2006.<sup>2</sup> Tr. 40; 313-318. Similarly,  
24 Shahm Martini, M.D., examined Plaintiff on December 2, 2005,  
25 slightly before Plaintiff's onset date and while she was still using

<sup>2</sup>Plaintiff informed Dr. Toews that she was in substance abuse treatment at the time of the examination. Tr. 313.

1 methamphetamine. Tr. 297-99. Medical opinions that predate the  
2 alleged onset of disability are of limited relevance. *Carmickle*, 533  
3 F.3d at 1165. Moreover, neither record reveals a medical opinion  
4 that Plaintiff is incapable of work.<sup>3</sup> In light of the fact that both  
5 records were dated prior to Plaintiff's onset date and date she  
6 stopped using methamphetamine, the ALJ was not required to address  
7 these because the evidence was neither significant nor probative.

8       **2. Billy R. Nordyke, D.O.**

9       Dr. Nordyke completed a Documentation Request for  
10 Medical/Disability Condition on January 23, 2008. Tr. 430-31. In  
11 that form, Dr. Nordyke indicated Plaintiff's condition would  
12 preclude her from working for two weeks. Tr. 431. Under the Social  
13 Security Act, in order to qualify as a disability, the impairment  
14 must be "expected to last for a continuous period of not less than  
15 twelve months." 42 U.S.C. § 423(d)(1)(A). The opinion of a  
16 physician that a Plaintiff's impairment will last just two weeks is  
17 not significant or probative to determining if Plaintiff is disabled  
18 under the Social Security guidelines.

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20       <sup>3</sup>Dr. Toews noted that Plaintiff reported Wellbutrin helped her  
21 feel less depressed and improved her concentration and memory. Tr.  
22 315. He opined Plaintiff demonstrated borderline range of  
23 intelligence, was capable of routine, repetitive activity and would  
24 have difficulty relating to co-workers and would work better in  
25 isolation. Tr. 317-18. Dr. Martini noted Plaintiff's affect was  
26 "euthymic-to-happy," appropriate, and her prognosis was mixed; good,  
27 dependent upon her current presentation of wanting to obtain her GED  
28 and move on with life, and guarded, based on her history. Tr. 299.

1       Dr. Nordyke also examined Plaintiff on July 17, 2008. Tr. 342-  
2 43. Dr. Nordyke diagnosed Plaintiff with depressive disorder,  
3 prescribed medication including the antidepressant Celexa, and  
4 recommended she return in three months. Tr. 343. The record  
5 reveals Dr. Nordyke did not administer any tests, nor did he provide  
6 an opinion regarding Plaintiff's capabilities. In short, Dr.  
7 Nordyke's second treatment record provides no opinion related to the  
8 duration or severity of Plaintiff's impairments and, thus, it is  
9 neither significant nor probative. As a result, the ALJ was not  
10 required to address either of Dr. Nordyke's treatment records.

11       **3. Sandy Birdlebough, Ph.D., ARNP**

12       Sandy Birdlebough, Ph.D., ARNP, first conducted a psychiatric  
13 examination of Plaintiff on August 27, 2008, because Plaintiff was  
14 seeking to restart treatment at Central Washington Comprehensive  
15 Mental Health. Tr. 345-46. Dr. Birdlebough diagnosed Plaintiff  
16 with ADHD, major depression, recurrent, polysubstance dependence in  
17 reported remission, rule-out bipolar, and personality disorder, not  
18 otherwise specified. Tr. 346. Dr. Birdlebaugh assigned Plaintiff  
19 a GAF score of 45. Tr. 346. Plaintiff began treatment, and a few  
20 weeks later, on September 10, 2008, Dr. Birdlebaugh examined  
21 Plaintiff, adjusted her medications and assigned her a GAF score of  
22 48. Tr. 387. Dr. Birdlebaugh modified Plaintiff's diagnoses to  
23 major depressive disorder, recurrent, moderate, combined substance  
24 dependence, unspecified hyperkinetic syndrome, childhood, and  
25 unspecified personality disorder. Tr. 386.

26       Plaintiff argues that the ALJ erred by failing to address Dr.  
27 Birdlebough's psychiatric exam report and later treatment note,  
28 because both records indicate she "still had serious symptoms/

1 impairments, i.e., inability to work, opining a GAF score of 45."  
2 ECF No. 16 at 7. Plaintiff's argument that Dr. Birdlebaugh opined  
3 Plaintiff could not work is apparently based solely upon the GAF  
4 assessment, because neither medical record contains an explicit  
5 opinion that Plaintiff is unable to work. See Tr. 345-47; 386-87.

6 A GAF score is a rough estimate of an individual's  
7 psychological, social, and occupational functioning used to reflect  
8 the individual's need for treatment. Diagnostic and Statistical  
9 Manual of Mental Disorders 20 (3rd. ed. rev. 1987). A GAF score  
10 between 41 and 50 denotes "serious symptoms (e.g., suicidal  
11 ideation, severe obsessional rituals, frequent shoplifting) OR any  
12 serious impairment in social, occupational, or school functioning  
13 (e.g., no friends, unable to keep a job)." DSM-IV at 32. However,  
14 the ALJ has no obligation to credit or even consider GAF scores in  
15 the disability determination. See 65 Fed. Reg. 50746, 50764-65  
16 (Aug. 21, 2000)( "The GAF scale . . . does not have a direct  
17 correlation to the severity requirements in our mental disorders  
18 listings."). "While a GAF score may be of considerable help to the  
19 ALJ in formulating the RFC, it is not essential to the RFC's  
20 accuracy." *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 241 (6th  
21 Cir. 2002).

22 Plaintiff's reliance upon the assigned GAF score as a  
23 definitive opinion about Plaintiff's level of disability within the  
24 social security context is misplaced. Dr. Birdlebaugh did not offer  
25 an explicit opinion that Plaintiff was incapable of work under the  
26 Social Security Administration guidelines. As such, the ALJ was not  
27 required to address Dr. Birdlebaugh's opinion.

28 Moreover, the circumstances of the examinations reveal Dr.

1 Birdlebough's opinion was not material to the ALJ's disability  
2 determination. The August 27, 2008, exam was essentially an intake  
3 exam that was based solely upon Plaintiff's subjective reports, and  
4 thus was not material or probative to the disability determination.  
5 Tr. 345-46. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir.  
6 2008) (an ALJ may reject a physician's opinion if it is based to a  
7 large extent on plaintiff's self- reports that have been properly  
8 discounted as incredible); see also *Thomas v. Barnhart*, 278 F.3d  
9 947, 957 (9<sup>th</sup> Cir. 2002) ("The ALJ need not accept the opinion of any  
10 physician, including a treating physician, if that opinion is brief,  
11 conclusory, and inadequately supported by clinical findings.").  
12 Additionally, at the time of the exam, Plaintiff was not regularly  
13 taking medication that alleviated her symptoms and, thus, her  
14 condition on that date was not illustrative of Plaintiff's actual  
15 abilities. See *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001,  
16 1006 (9th Cir. 2006) (impairments that are effectively controlled  
17 with medication are not disabling). As a result, the evaluations by  
18 Dr. Birdlebough do not amount to significant, probative evidence  
19 and, thus, the ALJ was not required to address this opinion. The  
20 ALJ did not err.

21 **4. Nina Rapisarda, M.S.W.**

22 The Plaintiff contends that the ALJ erred by rejecting the  
23 opinions of Nina Rapisarda, Plaintiff's treating therapist. ECF No.  
24 16 at 17-18. The ALJ gave little weight to Ms. Rapisarda's mental  
25 medical source statement for several reasons. Tr. 21. The ALJ  
26 noted that Ms. Rapisarda's assessment was contradicted by her  
27 treatment records, by Plaintiff's activities of daily living, by  
28 other medical assessments in the record, and the assessment was made

1 when Plaintiff was not taking medication that had previously  
2 controlled her symptoms. Tr. 21.

3 Plaintiff argues that Ms. Rapisarda is a treating source, and  
4 her assessment was consistent with the medical record as a whole.  
5 However, Plaintiff fails to cite to the record, or provide  
6 meaningful analysis to support her allegation. ECF No. 16 at 17-18;  
7 ECF No. 24 at 5. The court ordinarily will not consider matters on  
8 appeal that are not specifically and distinctly argued in an  
9 appellant's opening brief. See, *Carmickle*, 533 F.3d at 1161 n.2  
10 (9th Cir. 2008).

11 Notwithstanding Plaintiff's failure to adequately brief the  
12 issue, the ALJ's reasons for giving little weight to Ms. Rapisarda's  
13 opinion are specific and legitimate. See, *Morgan*, 169 F.3d at 603  
14 (internal inconsistencies within a physician's report supports the  
15 decision to discount the opinion of a physician); *Bayliss v.*  
16 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (ALJ permissibly  
17 rejected treating physician's opinion containing contradictory  
18 observations); and see 20 C.F.R. §§ 404.1527 (d)(2) and  
19 416.927(d)(2) (weight given to a treating physician's opinion  
20 depends in part on whether it is consistent with other evidence in  
21 the record); and see *Warre*, 439 F.3d at 1006 (impairments that are  
22 effectively controlled with medication are not disabling).  
23 Moreover, the ALJ's specific and legitimate reasons for rejecting  
24 Ms. Rapisarda's mental medical source statement are supported by the  
25 record. See Tr. 382-91; 420-22; 434-61. As a result, the ALJ did  
26 not err by giving little weight to the opinion of Ms. Rapisarda.

27 **C. Step Two**

28 Plaintiff contends that the ALJ erred by failing to find ADHD

1 among her severe impairments. ECF No. 16 at 14-16. At step two,  
2 the ALJ found Plaintiff had severe impairments of "drug induced mood  
3 disorder vs. depressive disorder, borderline personality disorder  
4 with anti social traits, and methamphetamine abuse, in remission  
5 since January 2006 per claimant report." Tr. 12-13. At step two of  
6 the sequential evaluation, the ALJ determines whether a claimant  
7 suffers from a "severe" impairment, i.e., one that significantly  
8 limits the physical or mental ability to do basic work activities.  
9 20 C.F.R. §§ 404.1520, 416.920(c). At step two, a claimant must  
10 make a threshold showing that her medically determinable impairments  
11 significantly limit her ability to perform basic work activities.  
12 See *Bowen*, 482 U.S. 137; 20 C.F.R. §§ 404.1520(c), 416.920(c).  
13 "Basic work activities" refers to "the abilities and aptitudes  
14 necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b).

15 To satisfy step two's requirement of a severe impairment, the  
16 claimant must prove the existence of a physical or mental impairment  
17 by providing medical evidence consisting of signs, symptoms, and  
18 laboratory findings; the claimant's own statement of symptoms alone  
19 will not suffice. 20 C.F.R. §§ 404.1508, 416.908. The fact that a  
20 medically determinable condition exists does not automatically mean  
21 the symptoms are "severe," or "disabling" as defined by the Social  
22 Security regulations. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*  
23 v. *Bowen*, 885 F.2d 597, 602-03 (9th Cir. 1989); *Key v. Heckler*, 754  
24 F.2d 1545, 1549-50 (9th Cir. 1985).

25 In this case, the ALJ found that Plaintiff complained of ADHD,  
26 but she reported related symptoms only prior to her sobriety date.  
27 Tr. 19. The record supports the ALJ's determination that  
28 Plaintiff's reported ADHD symptoms existed during her period of

1 methamphetamine and cocaine use. In March 2002, Jay M. Toews,  
2 Ed.D., examined Plaintiff and noted several times that she was  
3 evasive about substance abuse. Tr. 316-17. Dr. Toews diagnosed  
4 Plaintiff with methamphetamine and cocaine dependence and alcohol  
5 abuse in self-reported remission with rule-out substance abuse, and  
6 "Attention Deficit Hyperactivity Disorder, impulsive type,  
7 complicated by substance abuse." Tr. 318.

8 In April 2004, examining psychiatrist Paul Michels, M.D.,  
9 opined, "I don't think there is clear evidence for a diagnosis of  
10 ADHD. Instead, she seems to describe a lack of interest in  
11 motivation consistent with her severe character disturbance." Tr.  
12 312. Also, as the ALJ found, for a significant period Plaintiff  
13 chose to not medicate her ADHD. See, e.g., Tr. 541; 549; 557; and  
14 see *Warre*, 439 F.3d at 1006. In light of the medical evidence,  
15 Plaintiff failed to carry her burden to establish that after  
16 obtaining sobriety, she suffered from ADHD symptoms that  
17 significantly limited her ability to do basic work activities.

18 Moreover, an ALJ's error in failing to find a severe impairment  
19 at step two may be harmless, where ALJ considered the limitations  
20 resulting from the impairment later in the sequential disability  
21 evaluation process. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir.  
22 2007); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). In  
23 this case, Plaintiff's RFC accommodated ADHD-related difficulties  
24 Plaintiff might experience with sustained concentration by limiting  
25 her to "simple, routine repetitive tasks involving no more than two  
26 step commands." Tr. 14. As a result, even if the ALJ's failure to  
27 find ADHD as a severe impairment was error, such error was harmless.  
28 Accordingly, on this record, the ALJ did not err in failing to find

1 ADHD as a severe impairment at step two.

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's findings, the court  
4 concludes the ALJ's decision is supported by substantial evidence  
5 and is not based on legal error. Accordingly,

6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment, **ECF No. 23**, is  
8 **GRANTED**.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
10 **DENIED**.

11 The District Court Executive is directed to file this Order and  
12 provide a copy to counsel for Plaintiff and Defendant. Judgment  
13 shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

14 DATED September 30, 2013.

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**S/ JOHN T. RODGERS**  
17 UNITED STATES MAGISTRATE JUDGE  
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